

**MARIETTA COGGINS**  
Claimant

**STATE OF KANSAS**

AND

STATE SELF INSURANCE FUND

Insurance Carrier

The Administrative Law Judge applied the presumption of no work disability found in K.S.A. 1991 Supp. 44-510e and awarded claimant permanent partial disability benefits for a 14 percent functional impairment. Claimant requested the Appeals Board to review that finding

and to award work disability. Nature and extent of disability is the sole issue now before the Appeals Board.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award of the Administrative Law Judge should be affirmed.

Claimant began working for respondent June 12, 1989. In February 1992, while working as a mental retardation trainee for the respondent, claimant injured her left elbow and subsequently injured her right shoulder. Claimant was diagnosed as having ulnar nerve entrapment and underwent surgery by Dr. James E. Marvel. Later, claimant came under the treatment of orthopedic surgeon J. Mark Melhorn, M.D., who operated on both of claimant's upper extremities after having diagnosed bilateral carpal tunnel syndrome and also performed a surgical procedure on her right shoulder.

After recuperating from her injuries and surgeries, claimant was unable to return to work for respondent. Because claimant was unable to earn a comparable wage in the open labor market, respondent provided vocational rehabilitation consisting of reeducation and retraining. The plan lasted three years and resulted in claimant obtaining a bachelor of science degree in counseling from Southwestern College at Winfield. Thereafter, claimant was successful in finding employment with the state as a social worker earning approximately 133 percent of what she was earning on the date of accident. However, because claimant has a loss of ability to access the open labor market, claimant contends she has overcome the presumption of no work disability contained in K.S.A. 1991 Supp. 44-510e and is entitled to a work disability for these injuries.

The Appeals Board disagrees with claimant's arguments. The Appeals Board finds claimant has returned to work at a position within her restrictions earning more than a comparable wage and the presumption of no work disability contained in K.S.A. 1991 Supp. 44-510e is applicable. The statute provides:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence. There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.

The Appeals Board finds the presumption of no work disability has not been overcome and claimant is entitled to benefits based upon her functional impairment. No evidence has been presented that indicates claimant cannot indefinitely continue to work and earn a comparable wage. The Appeals Board also agrees with the finding by the Administrative Law Judge that the 14 percent rating given by Dr. Melhorn is the more credible opinion on claimant's impairment of function.

Claimant bears the burden of proof to establish her claim. "Burden of proof" is defined in K.S.A. 44-508(g) as "the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." The burden of proof is:

" . . . on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record." K.S.A. 44-501(a).

The Appeals Board adopts the findings and conclusions of the Administrative Law Judge set forth in the Award that are not inconsistent with the specific findings made herein.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated September 29, 1997, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February 1998.

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BOARD MEMBER

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BOARD MEMBER

c: Randy S. Stalcup, Wichita, KS  
Jeffery R. Brewer, Wichita, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director